DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Petition for Declaratory Ruling	)	
	)	
	)	
IN THE UNITED STATES DISTRICT COURT	)	
FOR THE MIDDLE DISTRICT OF FLORIDA	)	
TAMPA DIVISION	)	
Case No 8 00-CV-1231-T-17EAJ	)	
	)	
LINDA THORPE	)	
	)	
Representative Plaintiff,	)	
	)	
vs	)	CG Docket No 03-84
	)	
GTE CORPORATION, GTE FLORIDA	)	
INCORPORATED, ATT&T CORP ,	)	
SPRINT-FLORIDA, INCORPORATED, and	)	
MCI WORLDCOM NETWORK	)	
SERVICES, INC	)	
	)	
Defendants	)	
	)	
	)	
	)	

PETITIONER'S REPLY TO COMMENTS OF AT&T CORP. , CBEYOND COMMUNICATIONS, LLC, PAC-WEST TELECOMM, INC. AND US LEC CORP.

COMES NOW, the Petitioner, Linda Thorpe, Plaintiff in "THORPE vs GTE", United States District Court for the Middle District of Florida, Case No. 8·00-CV-1231-T-17EAJ (hereinafter referred to as the "GTE Class Action"), by and through her undersigned counsel, and files this, her Reply to Comments of AT&T Corp. (hereinafter referred to as "AT&T"), Cbeyond Communications, LLC, PAC-West Telecom, Inc and US LEC Corp.(having filed a joint Comment, being hereinafter collectively referred to as "Cbeyond") and states as follows.

Staack, Simms & Hernandez, P A
900 Drew Street, Suite 1, Clearwater, FL 33755

A. Factual Background

Petitioner herewith incorporates herein the Factual Background set out in her Petition as if set out in full [1]

B Issues Raised in Petition

Based upon the underlying Order of the District Court in and for the Middle District of Florida, Petitioner framed three issues for determination by this tribunal as follows:

1 Are the state claims raised by the Petitioner in the GTE Class action complaint preempted by the filed rate doctrine and the Federal Communications Act (the "Act") , giving the Federal Communications Commission exclusive jurisdiction over Petitioners claims in the GTE Class Action?

2. May Defendants, Local Service Providers ("LEC"s), provide "local service only to their customers, or must they, by virtue of their filed tariff rates or otherwise, in all events and as to all lines, couple local service with "long distance " service provided by any interexchange carrier ("IXC") , even where the customer has no need for long distance service on a give line?

3 If long distance service is not required to be coupled with local service in all events and as to all lines, does the practice of coupling such services violate the Act?

B. Comment of AT&T

1. Summary of Argument and Issues Raised

1.1. Petitioner's State Law Claims Are Not Preempted

[1] See Petition, at page 2

Staack, Simms & Hernandez, P A
900 Drew Street, Suite 1, Clearwater, FL 33755

In its Comment, AT&T raises two new issues in the context of its argument that Petitioner's claims are preempted by the filed rate doctrine and by the Federal Communications Act (the "Act")

1.1.1 That Petitioner claimed that AT&T had a duty to re-verify the assignment of AT&T as a long distance carrier, and

1.1.2. That the filed tariff doctrine preempts Petitioner's challenges to charges [leveled by AT&T] during the period she took service from AT&T.

Petitioner would submit that both of the above arguments are nothing more than a smokescreen Nowhere in the GTE Class Action or in her Petition does Petitioner argue or raise the issue that AT&T or any other IXC re-verify the assignment to such IXC by GTE or any of the other LECs in the Class. Also, contrary to the statements made by AT&T, Petitioner **does** dispute that AT&T provided her with services after it was arbitrarily assigned as IXC. She needed no such service on the subject lines and no services were provided during the material times as alleged in the GTE Class Action. It should be pointed out that the FCC's ruling, requiring verification of a change in IXC by the LEC is consistent with the relief sought by Petitioner in the GTE Class Action.

1.1.3 **Discussion**

In its Comment, AT&T relies on the Third Order on Reconsideration and Second Further Notice of Proposed Rule making, *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996,* 2003 WL 1209690 at ¶¶86-87, CC Docket No. 94-129 (March 17, 2003)("*2003 Slamming*

Order") Such reliance is surprising. The Slamming Order recently promulgated by the FCC mandates that LECs verify any change in IXC with the consumer and it does place the burden of confirming any change in IXC on the LEC This Slamming Order specifically discusses that it is not applicable to initiation of new service.[2] it states:

> We emphasize, however, that the statute does encompass all changes in a subscriber's selection of a provider of telecommunication service, regardless of whether such change occurs at the same time a subscriber changes residences or when a business relocates or expands. It is no less important for carrier change verification to be obtained when a consumer is receiving the service on new lines than when the carrier change occurs without new line installations.

However, it goes on to indicate that what manner of re-verification should be required for IXC service upon the initiation of new services or upon the expansion of prior services remains to be determined. It is certainly conceivable that the IXC will be held to a higher standard in the context of new service It is the belief of Petitioner that LECs and IXCs should be held to a duty to disclose to the consumer whether or not long distance service is required and available, and at what cost from which providers at any time when the consumer is purchasing a new phone line for use at his or her residence. The Slamming Order was not in effect during the times material to the GTE Class Action, however, the FCC's ruling in the Slamming Order is consistent with the relief sought by Petitioner in the GTE Class Action wherein she alleges that, as a matter of state law, the practice of both LECs and IXCs of arbitrarily selecting an IXC and providing long distance service at all times to all lines, without any communication with or consent from the consumer is improper and actionable.

AT&T further relies upon the First Report and Order, *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982 (1997)(*"Access Charge Order"*) and the case of *Southwestern*

---

[2] See III 13 at 19155

Staack, Simms & Hernandez, P.A.
900 Drew Street, Suite 1, Clearwater, FL 33755

Bell Telephone Company Co v FCC, 153 F. 3d 523 (8th Cir. 1998)[3]. This reliance is misplaced. The Access Charge Order determined generally that an LEC could charge a customer an "FCC Access" charge relating to long distance service even where the customer did not use long distance service It simply does not deal with charges to the consumer by the IXC for unneeded and unwanted service by an IXC, such as AT&T.

The Court in *Southwestern Bell* determined that the FCC had properly exercised its rule making authority in promulgating the Access Charge Order, it did not adjudicate any issues raised by the Petition filed herein or the GTE Class Action Suit, however, there is a lengthy discussion of the fact that internet service providers ("ISP"s) the companies which provide internet access to consumers such as Petitioner should pay for long distance access. It was held under both the Access Charge Order and the *Southwestern Bell* case that ISPs should not incur such charges. This is consistent with long standing governmental policy encouraging use of the internet AT&T's practice of charging the consumer a minimum monthly charge for long distance availability that the consumer did not contract for, was not aware of and did not need in connection with use of her modem line is hardly consistent with this public policy

AT&T relies heavily on the case of *AT&T v. Central Office Tele. Inc*, 524 U.S. 214 (1998) in support of its position that the "filed tariff doctrine preempts Petitioners claims". It does not As is clear in the GTE Class Action Complaint, the Petition and all other pleadings filed in this cause, Petitioner is seeking no special treatment for herself, in fact, just the opposite is true, she is seeking to certify a nationwide class to avoid the discrimination that the court in *Central Office* was trying to avoid. In footnote 7 at page 11 of its Comment,

[3] AT&T was also a Plaintiff in this action disputing an FCC rule

Staack, Simms & Hernandez, P A
900 Drew Street, Suite 1, Clearwater, FL 33755

AT&T cites to *Central Office* with the Court's finding that the doctrine applies to all "subjects that are specifically addressed in the filed tariff". The subject matter of tariffs filed by all of the LECs and IXCs named as Defendants in the GTE Class Action Complaint and in the Petition herein filed are **not** being challenged or addressed by Petitioner. Instead, Petitioner is seeking relief from inappropriate conduct of the Defendants that is, in the first instance, governed by long established principals of state law in all of the 50 states of the United States and all of its territories. Alternatively, the relief sought by Petitioner, on her own behalf and on behalf of all others similarly situated is sought under the "savings clause" of the Act and is for violations of state laws outside of the parameters of the Act and **not** contrary to the filed rate doctrine. See *Weinberg v. Sprint Corp.*, 165 F.R D. 431 (D.N.J. 1996) (where court remanded consumer case complaining of non-disclosure of "rounding - up" billing practices because it was not an attack on billing rates); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633 (6th Cir 1987) (holding that the Communications Act preserved state law claims for fraud and deceit against a telecommunications carrier); *Bruss Company v. Allnet Communication Services, Inc* , 606 F. Supp. 401, 410-11 (N D.Ill. 1985) (holding that the Communications Act preserved state common law and statutory fraud claims); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill 2d 428, 493 N.E.2d 1045, 1051, 98 Ill. Dec. 24 (Ill. 1986) (holding that the Communications Act preserved state law claims arising out of defendant's allegedly false advertising practices); *Am Inmate Phone Systems, supra*, 787 F.Supp. At 856-59 (N.D.Ill 1992) (holding that the Communications Act preserved state law contract and consumer fraud claims); *Cooperative Communications v AT&T Corp.*, 867 F.Supp. 1511, 1515-17 (D Utah 1994) (holding that the Communications Act preserved state law claims for

intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing and unfair competition)

1.2. **Petitioner has never claimed to be entitled to local service exclusive of Federally authorized charges.**

This portion of AT&T's argument[4] is almost startling in its contrast to AT&T's previous position. In AT&T's Motion to Dismiss and accompanying Memorandum of Law,[5] it argued forcefully that Petitioner could not have a line for local service only but that, under applicable tariffs, the two services were bundled and Petitioner had to have long distance service. Now, AT&T argues that "Defendants do not contend that the Communications Act mandates the bundling of local and long distance services." We agree. The Act does not address this unauthorized bundling, thus Petitioner's state law claims are not preempted.

In addition, AT&T raises, purely for obfuscatory purposes, the "argument" that Petitioner is trying to avoid payment of Federally authorized charges which relate to long distance service and are passed through her LEC. This is contrary to the allegations of the GTE Class Action Complaint.[6] Petitioner is objecting only to payment of the minimum monthly charge as billed by an IXC for a service that she did not want, did not need and for which she had no contract. AT&T states that it and GTE "noted that a customer can 'choose [. .] no presubscribed interexchange carrier,' . ". Petitioner asserts that she was given no

---

[4] See page 11 of AT&T's Comment

[5] See GTE Florida InCorporated and AT&T Corp 's Dispostive Motion to Dismiss Pursuant to Federal Civil Procedure Rule 12(b)(6) attached as Composite Exhibit "E" to the within Petition

[6] See Exhibit "A" attached to the within Petition

Staack, Simms & Hernandez, P A
900 Drew Street, Suite 1, Clearwater, FL 33755

choice and there is no shred of factual evidence anywhere, in any pleading, in any exhibit either in the GTE Class Action or in this Petition which refutes Petitioners assertions.

1.3. **The Commission should issue an Advisory Opinion regarding LEC Bundling of Local and Long Distance Services.**

As AT&T states, "both the Commission and the antitrust authorities have long recognized that although bundling is generally pro-competitive and reasonable, bundling by a dominant carrier with market power in one or both services can be anti-competitive and unreasonable and, therefore, a violation of Section 201 of the Communications Act." AT&T's assertion that the Commission should form no opinion in this regard is disingenuous at best It is true that Petitioner has raised only state law claims in her complaint, [7] however, AT&T and the other Defendants in the GTE Class Action vigorously argued the Federal law preempted Petitioner's State law claims, and, accordingly AT&T's present position rings hollow AT&T and the other Defendants were successful, the Federal Court for the Middle District of Florida denied Petitioner's Motion to Remand the GTE Class Action, making the judicial determination that Petitioner had raised a Federal question. In addition, it does not matter that Petitioner made no Federal claims, all of the Defendants, including AT&T raised Federal law as a defense and should not now be heard to complain of the success of those efforts

[7] A fact which AT&T chooses to recognize now, but chose not to recognize when removing the GTE Class Action to Federal Court from State Court

Staack, Simms & Hernandez, P A
900 Drew Street, Suite 1, Clearwater, FL 33755

C. Comment of Cbeyond

1. Summary of Argument and Issues Raised

1 1 Demand for Local Service

Cbeyond contends that there is no demand for local only service. The only proof offered is Cbeyond's statement that "if there were in fact a significant demand for local-only service, many LECs would be offering such service." The fact that no LEC is offering local only service does not prove up a lack of demand where the availability of such service is not disclosed to the consumer. The consumer is not in a position to innately be aware that he or she can save money by not paying for unnecessary long distance service. Cbeyond's position is analogous to stating that "there is no demand for a consumer to stay with a given IXC" in support of slamming practices. Millions of people use computers in their homes and offices, within those millions are also millions who access the internet by using a modem phone line and within those millions are also a very great number who have no need of long distance service on their modem lines Further, Petitioner also used a separate phone line exclusively for incoming calls to her answering machine. Although the number persons desiring a local-only line for such purpose is probably smaller than the set of persons who have local-only modem lines, we can only speculate as to the size of the group. There are certainly a number of other valid reasons for a consumer to opt for local-only service on a given phone line if the consumer knew such option was available.

1 2. **Federal Law requires an LEC to provide Access to IXCs.**

Petitioner believes that applicable law requires that an LEC have the ability to access IXCs, but neither applicable law nor the tariffs filed by Cbeyond or, for that matter, AT&T require that long distance service be bundled with local service. Cbeyond goes on to argue the basis for an LEC to pass through the "FCC Access Charge", which is has been determined is a legitimate charge for having to have the *ability* to access IXCs, even where such service is not utilized by the consumer. Again, Petitioner is not now and never has contested the propriety of the FCC Access charges passed through by the LEC. The argument raised by Cbeyond is obviously raised merely to cloud the issues raised in the petition.

1.3. **The CPE Bundling Order[8] does not demonstrate that LECs are not required to provide local-only service.**

A cursory review of the CPE Bundling Order indicates that Cbeyond's argument here is misplaced One needs only look to the FCC's definition of bundling:

> We view bundling as the offering of two or more products or services at a single price, typically less than the sum of the separate prices.[9]

In this portion of its argument Cbeyond is merely saying that if the subject LECs and IXCs were marketing and selling to the consumer a fixed price for combined local and long distance service that probably would be lawful under the CPE Bundling Order. Actually

---

[8] 16 FCC Rec 7418, adopted March 22, 2001

[9] CPE Bundling Order, ¶15 at page 7426

such an unlikely offering would presently run afoul of the LECs and IXCs filed tariffs. The CPE Bundling Order, although referencing bundling "enhanced services, and local exchange services at one price", more directly addresses the bundling of equipment sales with telephone services

The FCC's rationale in adopting the CPE Bundling Order is also of application here, the Commission stated:

> We discuss initially the public interest benefits of bundling, and find, in particular, that offering consumers the choice of purchasing packages of products and services at a single low-rate will encourage them to subscribe to new, advanced, or specialized services by reducing the cost that they have to pay up-front to purchase equipment, or by giving them a choice of relying on one provider instead of having to assemble the desired combinations on their own.[10]
>
> When the markets for both bundled an unbundled commodities are sufficiently competitive, consumers can decide whether the benefits of a package exceed the potential benefits of buying the components of the bundle individually.[11]

In other words, the bundling benefits the consumer where the consumer can make a reasoned decision. Where the consumer can look at the price of services which are fully disclosed and compare the cost of those services to other services the nature and price of which are fully disclosed Where one of the alternatives is for the consumer to purchase an individual component

---

[10] CPE Bundling Order ¶10 at page 7424

[11] CPE Bundling Order ¶6 at page 7423

Staack, Simms & Hernandez, P A
900 Drew Street, Suite 1, Clearwater, FL 33755

Neither the CPE Bundling Order or the concept of bundling itself relates to the conduct of the Defendant LECs and IXCs in the GTE Class Action. Slamming is not bundling There is no bundling where the consumer has no choice or where the consumer is told by the service provider that he or she has no choice.

D. Conclusion

Neither AT&T nor Cbeyond have raised any issues which would prevent this Commission from finding that:

1 The claims raised by Petitioner as Plaintiff in the GTE Class Action are not preempted by the filed rate doctrine.

2. The claims raised by Petitioner as Plaintiff in the GTE Class Action are not preempted by the Federal Communications Act.

3 There is no requirement that an LEC bundle or couple local service with long distance service at all times and for all phone lines.

4 An LEC must disclose to the consumer the right to "local-only" service and provide the consumer with information as to what IXCs service the consumer's area and the cost of each such IXC's long distance service.

5. The act of coupling or bundling local and long distance service without offering the consumer a choice of carriers and without disclosing the option of "local-only" service to the consumer is *per se* a violation of the Act.

6. The act of coupling or bundling local and long distance service without offering the consumer a choice of carriers and without disclosing the option of "local-only"

service to the consumer could, depending upon the facts and circumstances constitute a violation of consumer protection statutes.

Respectfully submitted,

James A. Staack, Esquire
STAACK, SIMMS & HERNANDEZ, P.A
Counsel for Petitioner
900 Drew Street, Sutie #1
Clearwater, FL 33755
Ph (727) 441-2635
Fax: (727) 461-4836

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded on this 29th day of July, 2003, to:

Peter Murnagham, Esquire
Dennis Ferguson, Esquire
MURNAGHAM & FERGUSON
100 N Tampa Street, Suite 2600
Tampa, FL 33601-2937
Local Counsel for Sprint-Florida, Inc.

Brant M. Laue, Esquire
Anne E. Gusewelle, Esquire
ARMSTRONG TEASDALE, LLP
2345 Grand Blvd., Suite 2000
Kansas City, MO 64108
Trial Counsel for Sprint-Florida, Inc.

Michael S Hooker, Esquire
Guy McConnell, Esquire
GLENN RASMUSSEN & FOGARTY
100 South Ashley Drive, Suite 1300
Tampa, FL 33601
Local Counsel for GTE Corp.
and GTE Florida, Inc.

Peter Kontio, Esquire
Michael P. Kenny, Esquire
ALSTON & BIRD LLP
One Atlantic Center
1201 W Peachtree Street
Atlanta, GA 30309-3424
Trial Counsel for GTE Corp.
and GTE Florida, Inc.

Daniel C. Johnson, Esquire
CARLTON FIELDS
P.O. Box 1171
Orlando, FL 32802-1171
Local Counsel for AT&T Corp

Howard Spierer, Esquire
295 North Maple Avenue
Room 1446L3
Basking Ridge, NJ 07920
Trial Counsel for AT& T Corp.

Ronald S. Holliday, Esq.
Lonnie L. Simpson, Esq
PIPER MARBURY RUDNICK
& WOLFE, LLP
101 E. Kennedy Blvd , Suite 2000
Tampa, FL 33602-5133
Local Counsel for MCI WorldCom

Adam H. Charnes, Esquire
WorldCom, Inc.
1133 - 19th Street, N.W.
Washington, DC 20036
Senior Litigation Counsel for
MCI WorldCom

Julia O. Strow
Vice President - Regulatory &
Industrial Relations
Cbeyond Communications, LLC
320 Interstate North Parkway, SE
Suite 300
Atlanta, Georgia 30339

John Sumpter
Vice President, Regulatory
Pac-West Telecomm, Inc.
4210 Coronado Avenue
Stockton, California 95204

Wanda G. Montano
Vice President, Regulatory &
Industry Affairs
US LEC Corp
6801 Morrison Boulevard
Charlotte, North Carolina 28211

Patrick J. Donovan
Michael P. Donahue
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7643 (Facsimile)
Counsel for Cbeyond Communications, LLC,
Pac-West Telecomm, Inc., and US LEC Corp.

Lawrence J. Lafaro
Stephen C Garvito
Teresa Marrero
AT&T CORP
One AT&T Way
Bedminster, NJ 07921
(908) 532 1842

David L. Lawson
Paul J. Zidlicky
Jonathan F. Cohn
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

James A. Staack, Esquire